IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

GARY SPIVEY and KAREN SPIVEY, *Plaintiffs*,	§	
	§	
v.	§	
	§	
HOME123 CORPORATION, HSBC BANK USA, NATIONAL ASSOCIATION, SELIM H. TAHERZADEH, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, and JAMES E. BLUE, *Defendants*.	§	CIVIL ACTION NO. 1:11-cv-00076

DEFENDANTS HSBC BANK, USA. N.A.'S, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS' AND JAMES E. BLUE'S NOTICE OF REMOVAL

TO THE HONORABLE JUDGE OF SAID COURT:

Notice is hereby given that, pursuant to 28 U.S.C. §§ 1332, 1441 and 1446, Defendants HSBC Bank, USA, N.A. ("HSBC"), Mortgage Electronic Registration Systems ("MERS"), and James E. Blue ("Blue") (collectively, the "Removing Parties") hereby remove this action from the 26th Judicial District Court of Williamson County, Texas, to the United States District Court for the Western District of Texas, Austin Division, stating the following as grounds for removal of this action:

I. STATE COURT ACTION

1. On November 29, 2010, Plaintiffs Gary Spivey and Karen Spivey ("Plaintiffs") filed their Original Petition for Quiet Title ("Petition") in the 26th Judicial District Court of Williamson County, Texas, styled *Gary Spivey and Karen Spivey v. Home123 Corporation, HSBC Bank USA, National Association, Selim H. Taherzadeh, Mortgage Electronic Registration Systems, and James E. Blue* (the "State Court Action").

2. There is no return of citation on file for Home123 Corporation ("Home123"). Because to the best of the Removing Parties' knowledge Home123 has not been served, the Removing Parties can remove this action without its consent. *See Getty Oil Corp. v. Ins. Co. of N. America*, 841 F.2d 1254, 1262 n.9 (5th Cir. 1988).

3. There is no return of citation on file for HSBC and HSBC has no record of being properly served with citation.

4. There is no return of citation on file for Selim Taherzadeh ("Taherzadeh"). However, Taherzadeh filed an Original Answer and Special Exceptions in the State Court Action on January 3, 2011.[1]

5. There is no return of citation on file for MERS and MERS has no record of being properly served with citation.[2]

6. There is no return of citation on file for Blue and Blue has no record of being properly served with citation.

7. Although unclear, the basis for Plaintiffs' claims against all Defendants appears to be the allegation that there are "a number of forged and fraudulent documents in the chain of title of Plaintiffs' property." *Petition* ¶ 15. Plaintiffs assert claims for fraud, conversion, unjust enrichment, civil conspiracy, quiet title, "attempt to wrongfully foreclose," and lack of due process. *Petition* pp. 5-9. Plaintiffs seek a declaratory judgment that "clear and perfect title is vested in the Plaintiffs" and "that all liens in public record causing clouds on Plaintiffs' title be released or removed." *Petition* pp. 10-11. In the alternative, Plaintiffs request that their Original

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[1] Taherzadeh has consented to the removal of this lawsuit. A copy of Taherzadeh's Notice of Consent to Removal, which is being contemporaneously filed with this Court, is attached as **Exhibit A.**

[2] MERS and Blue have received copies of the Petition, but these copies were not served in accordance with Texas Rules of Civil Procedure.

Note and Deed of Trust be returned to them and all "gains generated from the use" of the Note and Deed of Trust be returned with these documents. *Petition* p. 11. In the alternative, Plaintiffs seek damages in "the amount of the property plus three times its value; the amount of $1,584,000, as punitive damages." *Petition* p. 11.

8. With this Notice of Removal, the Removing Parties remove the State Court Action to this Court on the basis of diversity jurisdiction, as more fully described below.

II. PROCEDURAL REQUIREMENTS

9. This action is properly removed to this Court, as the State Court Action is pending within this district and division. 28 U.S.C. §§ 1441, 1446(a).

10. Removal is timely under the second paragraph of 28 U.S.C. § 1446(b).

11. Pursuant to 28 U.S.C. § 1446(a), attached hereto as **Exhibit B** is a true and correct copy of the entire file of record with the Court in the State Court Action, including all process, pleadings, and orders served upon the Removing Parties in this action.

12. Pursuant to 28 U.S.C. § 1446(d), the Removing Parties are also simultaneously filing a copy of this Notice of Removal in the 26th Judicial District Court of Williamson County, Texas. A copy of the Notice of Removal filed in the State Court Action is attached hereto as **Exhibit C**.[3]

III. DIVERSITY OF CITIZENSHIP[4]

13. Where there is complete diversity among parties and the amount in controversy exceeds $75,000, an action may be removed to federal court. 28 U.S.C. §§ 1332(a), 1441(a).

[3] The Removing Parties have not included Exhibit 1 to the state court removal notice in Exhibit C because Exhibit 1 is a copy of the notice of removal filed in this Court.

[4] Plaintiffs refer to the Truth in Lending Act ("TILA") and Fair Debt Collection Practices Act ("FDCPA") in their petition, but do not appear to attempt to state a cause of action under either federal statute. However, to the extent Plaintiffs are bringing an action under TILA and/or FDCPA, then this Court also has federal question jurisdiction.

Complete diversity exists in this case because Plaintiffs are not citizens of the same state as Defendants Home123, HSBC, MERS, or Blue, and Defendant Taherzadeh is a nominal defendant whose citizenship should be disregarded for purposes of determining diversity of citizenship. As shown below, the amount in controversy requirement is also satisfied.

A. Diversity of Citizenship

14. Plaintiffs are citizens of Texas. *Petition* ¶ 3.

15. Home123 is a California corporation. Home123's parent company, New Century Mortgage Corporation, filed for bankruptcy, (*In re New Century TRS Holdings, Inc.*, Case No. 07-10416, In the United States Bankruptcy Court for the District of Delaware), and upon information and belief, Home123 no longer has a principal place of business in any state. Therefore, Home123 is a citizen of California for diversity purposes.

16. As a national banking association, Defendant HSBC's citizenship is determined solely by the location of its main office, as designated in its articles of association. *See* 28 U.S.C. § 1348; *Wachovia Bank v. Schmidt*, 546 U.S. 303, 318 (2006). HSBC's main office is located in Delaware. Therefore, HSBC is a citizen of Delaware for diversity purposes.

17. MERS is a foreign corporation, organized and existing under the laws of the state of Delaware, with its principal place of business in the state of Virginia. Therefore, MERS is a citizen of Delaware and Virginia for diversity purposes. 28 U.S.C. § 1332(c)(1).

18. Blue is an individual citizen of South Carolina.

19. Although Defendant Taherzadeh is believed to be an individual citizen of Texas, his citizenship should be disregarded for purposes of determining diversity jurisdiction because Taherzadeh was improperly joined as a defendant to this lawsuit. *See Smallwood v. Illinois Cent. R.R. Co.*, 385 F.3d 568, 572 (5th Cir. 2004). A removing party may establish improper joinder

by showing that the plaintiff is unable to establish a cause of action against the non-diverse defendant under state law. *Id.* at 573. The court looks at "whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant." *Id.* A "mere theoretical possibility" of recovery under state law does not suffice to preclude removal. *Badon v. RJR Nabisco, Inc.*, 236 F.3d 282, 286 n.4 (5th Cir. 2000).

20. From the face of Plaintiffs' Petition it is evident that Plaintiffs have no possibility of establishing a cause of action against Taherzadeh under Texas law. *See Larroquette v. Cardinal Health 200, Inc.*, 466 F.3d 373, 376 (5th Cir. 2006) (holding that standard for establishing improper joinder is "whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant."). In applying this test, the court conducts a Rule 12(b)(6)-type analysis, looking initially at the allegations of the complaint to determine whether, under state law, the complaint states a claim against the in-state defendant. *Id.*

21. Plaintiffs have not pled a claim for which relief can be granted against Taherzadeh. The majority of Plaintiffs' claims are globally asserted against "Defendants" and do not specify at which Defendant or Defendants they are directed. However, Plaintiffs' only assertions against Taherzadeh specifically are contained within their claim for "attempt to wrongfully foreclose." *Petition* ¶ 35-36. Attempt to wrongfully foreclose is not a cause of action under Texas law. *Smith v. J. P. Morgan Chase Bank, N.A.*, Civil Action No. H-10-3730, 2010 WL 4622209, at * 2 (S.D. Tex. Nov. 4, 2010) (holding that "[u]nder Texas law, even if a

mortgage holder wrongfully attempts foreclosure, there is no claim for wrongful foreclosure if the mortgagor does not lose possession of the home."); *see also Port City State Bank v. Leyco Constr. Co.*, 561 S.W.2d 546, 547 (Tex. Civ. App.—Beaumont 1977, no writ).

22. Further, Plaintiffs cannot state a claim against Taherzadeh under any of Plaintiffs' other globally pled causes of action. Plaintiffs' fraud claim is based on Plaintiffs' allegation that "Defendants did not lend any money to Plaintiffs . . . and by duplicitous means caused Plaintiffs to believe they had received a loan of money . . . ." *Petition* ¶ 19. Plaintiffs' conversion claim appears to be based on an alleged misrepresentation that Plaintiffs had been loaned money or were liable for a debt. *Petition* ¶ 22. Plaintiffs' unjust enrichment claim is based on the "exchange . . . made at the closing table." *Petition* ¶ 25. Plaintiffs' civil conspiracy claim is directed against "Defendants" but appears to be based on "predatory lending practices." *Petition* ¶ 27. But Plaintiffs fail to plead facts that Taherzadeh had anything to do with the origination of Plaintiffs' loan. Finally, Plaintiffs' quiet title action appears to be directed only against Home123 and its "successors and assigns." *Petition* ¶¶ 28-30. But there is no allegation that Taherzadeh, as foreclosure trustee, is claiming a personal interest in the property.

23. Plaintiffs' only factual allegations regarding Taherzadeh are that he signed the Notice of Acceleration and the Assignment of Plaintiffs' loan and that the Assignment "was fabricated in a 'foreclosure mill', which in this instance is the law firm of Brice, Vander, Linden & Wernick, P.C." *Petition* ¶ 36. These allegations do not establish a reasonable basis for Taherzadeh's liability under any of Plaintiffs' causes of action.

24. Because there is no reasonable basis for the Court to predict that Plaintiffs might be able to recover against Taherzadeh on any cause of action, Taherzadeh was improperly joined

as a defendant to this lawsuit, and his citizenship should be disregarded. Accordingly, there is complete diversity of citizenship among the parties.

B. Amount in Controversy

25. The amount at issue more likely than not exceeds $75,000 exclusive of interest and costs. Where a defendant can show, by a preponderance of the evidence, that the amount in controversy is greater than the jurisdictional amount, removal is proper. *See White v. FCI U.S.A., Inc.*, 319 F.3d 672, 675 (5th Cir. 2003) (affirming district court's conclusion that it was "more probable than not" that damages were over $75,000 where the total amount of relief was not stated in the petition); *see also St. Paul Reins. Co. v. Greenberg*, 134 F.3d 1250, 1253 n.13 (5th Cir. 1998) ("[t]he test is whether it is more likely than not that the amount of the claim will exceed [the jurisdictional minimum]."). The defendant can meet its burden if it is "facially apparent" from the petition that the claims probably exceed $75,000, or if the defendant introduces other evidence to show that the amount in controversy more likely than not exceeds $75,000. *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002); *Ham v. Bd. Of Pensions of the Presbyterian Church*, No. 3:04-CV-2692-P, 2005 U.S. Dist. LEXIS 3682, at *6-9 (N.D. Tex. Mar. 8, 2005); *Carnahan v. S. Pac. R.R. Transp. Co.*, 914 F. Supp. 1430, 1431-32 (E.D. Tex. 1995).

26. Plaintiffs seek damages in "the amount of the property plus three times its value"—calculated by Plaintiffs to be $1,584,000—as punitive damages. The loan was for $176,000. *See Note* and *Deed of Trust*, **Exhibit D**. Further, a tax appraisal of the property indicates that it is worth $156,288.[5] A true and correct copy of an appraisal by the Williamson

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[5] The Removing Parties do not contend that this particular appraisal constitutes the most accurate valuation of the property at issue. Such appraisal is provided only for the purpose of establishing a base line value to prove that the amount in controversy requirement is satisfied.

Central Appraisal District is attached hereto as **Exhibit E.** Because Plaintiff seeks damages "in the amount of the property," Plaintiff clearly seeks more than $75,000.

27. Further, when the right to property is at issue, courts look to the value of the property to determine whether the minimum amount in controversy has been met for jurisdictional purposes. *Waller v. Prof'l Ins. Corp.*, 296 F.2d 545, 547-48 (5th Cir. 1961). In this case, Plaintiffs seek to have title vested in them and to have all liens—including their mortgage—removed. *Petition* p. 10. Because Plaintiffs are seeking this equitable relief, the right to property is at issue, and the amount in controversy is determined by the value of the property. *See Garcia v. Koch Oil Co. of Tex., Inc.*, 351 F.3d 636, 640 (5th Cir. 2003) (stating that "in cases seeking equitable relief 'it is well established that the amount in controversy is measured by the value of the object of the litigation'") (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977)); *see also Leininger v. Leininger*, 705 F.2d 727, 729 (5th Cir. 1983). The true object of the litigation in this case is Plaintiffs' property, which secures the $176,000 mortgage loan at issue. *See* Exhibit C. Moreover, as discussed above, a tax appraisal of the property indicates that it is worth $156,288. *See* Exhibit D. The value of the property at issue exceeds $75,000.

28. Based on the value of the injunctive relief as reflected in the value of the property, on the face of Plaintiffs' Petition the amount in controversy "more likely than not" exceeds $75,000. *White,* 319 F.2d at 675-77. Moreover, there is complete diversity between the parties in this lawsuit. Thus, this Court has jurisdiction pursuant to 28 U.S.C. § 1332(a), and this Notice of Removal is proper and timely filed. 28 U.S.C. § 1441.

IV. PRAYER

WHEREFORE, Defendants HSBC Bank USA, N.A., Mortgage Electronic Registration Systems, and James E. Blue remove this action from the 26th Judicial District Court of Williamson County, Texas, to the United States District Court for the Western District of Texas, Austin Division, so that this Court may assume jurisdiction over the cause as provided by law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served as indicated on this 25th day of January, 2011 to the following:

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